

AUG 04 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICIO ORTIZ-CARDENAS,

Defendant - Appellant.

No. 05-30299

D.C. No. CR-01-02069-RHW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Submitted July 24, 2006^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Patricio Ortiz-Cardenas appeals from the sentence imposed by the district court following revocation of his supervised release. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Ortiz-Cardenas contends that the supervised release revocation procedure set forth in 18 U.S.C. § 3583 and Federal Rule of Criminal Procedure 32.1(b) is unconstitutional pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005), in that it does not provide for a jury determination of all facts beyond a reasonable doubt necessary to justify incarceration. This contention is foreclosed by *United States v. Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006) (holding that “[b]ecause the revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary, it is constitutional under *Booker*,” and that “[i]t is clear from *Booker* that there is no Sixth Amendment *Apprendi* violation so long as the Guidelines are advisory”).

Because Ortiz-Cardenas’ challenge pursuant to *Apprendi* and *Booker* fails, we need not address Ortiz-Cardenas’ contentions as to what remedy is applicable.

AFFIRMED.